

No. 20510.✓
IN THE

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United States Court of Appeals

FOR THE NINTH CIRCUIT

AEROTEC INDUSTRIES OF CALIFORNIA, a corporation;
AEROTEC INDUSTRIES, INC., a corporation; UNIVER-
SAL OIL PRODUCTS COMPANY, a corporation;

Appellants,

vs.

PACIFIC SCIENTIFIC COMPANY, a corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

C. A. MIKETTA,
WILLIAM POMS,
GUY PORTER SMITH,
of

MIKETTA, GLENNY, POMS & SMITH

210 West Seventh Street,
Suite 909,
Los Angeles, Calif. 90014,
Attorneys for Appellants.

Of Counsel:

E. SEWARD STEVENS,
of
GUION AND STEVENS,
P.O. Box. 338,
Litchfield, Conn. 06759.

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Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal from a judgment of the District Court for the Southern District of California, Central Division (R. 944). The cause of action as stated in the Complaint (R. 2) is for alleged infringement of Pfankuch *et al.* Patent No. 2,845,233 and Cushman *et al.* Patent No. 2,845,234, both entitled "Safety Apparatus," which are inertia operated mechanical devices to lock a cable.* Plaintiff is a California corporation and owns the patents. Defendant, Universal Oil Products Company, a Delaware corporation, having its principal offices in Des Plaines, Illinois, purchased the defendant, Aerotec, which is now a division of Universal Oil Products. Jurisdiction of the Trial Court arises

*Patents Nos. 2,845,233 and 2,845,234 will hereafter be identified by '233 and '234, respectively. Appellants will hereafter be referred to as defendants.

under 28 U.S.C. §1338, and the Patent Laws Title 35 U.S.C.

Defendants' answer (R. 10) denied validity and infringement of the patents in suit and asserted affirmative defenses and a counterclaim for invalidity and non-infringement. The Trial Court did not request a Pre-trial Conference Order.

After (a) sixteen days of trial and argument before the Honorable Thurmond Clarke; (b) the filing of extensive briefs after trial (R. 592, 732, 819) over approximately two and one-half months; and (c) an additional six month period during which the Trial Court had the matter under submission, the patents in suit were both held valid and that defendants infringed claims 7 and 9 of Patent No. 2,845,233 and claims 1 and 5 of patent No. 2,845,234.

JURISDICTION.

Jurisdiction to review the judgment of the District Court is conferred by 28 U.S.C. §1291. The judgment was entered on August 3, 1965 (R. 944) and Notice of Appeal (R. 994) was filed by defendants on October 1, 1965. The appeal was timely taken in accordance with Rule 73 of the Federal Rules of Civil Procedure and the Rules of this Court as defendants filed a motion (R. 947) to amend and make additional findings pursuant to Rule 52(b), such motion being denied (R. 985) by the Trial Court who signed and entered the findings of fact and conclusions of law (R. 928) prepared by plaintiff's counsel without any changes.

STATEMENT OF THE CASE.

The four claims in issue of the two patents in suit all require the combination of four elements, namely:

- (a) a vehicle;
- (b) an inertia or acceleration-responsive safety device including a reel, mounted on the vehicle;
- (c) a cable having one end thereof attached to and adapted to be wound on the reel of the safety device; and
- (d) an object adapted to be secured to the other end of the cable.

This is the **same old combination** of four elements which is found in the old trolley catcher patents; this **old combination** performs the **same result**, namely, it permits the **object** (pilot, passenger, freight or trolley pole) to move normally, but when such **object** and the cable connected to the object accelerates or its speed suddenly increases, the safety device or cable locking device locks the reel and cable and prevents further movement of the object.

This is a case wherein the purported invention relates to an **old combination of elements** in exactly the same relationship as in the past, each element performing its normal and expected function, and producing an old and expected result. The patents in suit do not conform to the standard of invention as a matter of law.

The four claims in issue of the patents in suit must be interpreted in the light of the prior art:

“Under §103, the scope and content of the prior art are to be determined; differences between the

prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.”

Graham v. John Deere Company of Kansas City,
383 U.S. 1, 86 S. Ct. 684, at 694 (1966).

Your Honors are familiar with very pertinent prior art since you saw and rode on trolley cars. The trolley car had a trolley catcher attached to the vehicle; the trolley catcher had a reel to which one end of a cable or line was attached, the other end of the cable was attached to the trolley pole (**object**) which was to be restrained in an emergency. The operation and purpose was stated (in 1900 Patent 657,342, Ex. D) as follows:

“It (trolley catcher) is arranged to allow the trolley line to unwind from the reel that forms part of the attachment if it unwinds slowly, but to catch the reel and stop the unwinding of a cord from the reel if there is a sudden strain put upon it, such as is put upon a trolley line when the trolley wheel leaves the wire.” (Page 1, lines 22-29).

Ham patent 700,763 of 1902 (Ex. D) described an improved device in which:

“* * * a sudden increase of rotative speed of the trolley-reel, such as results when the trolley jumps the wire, is instantly responded to by the catching devices which stop the further ascent of the trolley instantly.” (Page 1, lines 40-45).

Since, as Ham states, the device actuates “in case of emergency,” it is a safety apparatus. The patents in suit are titled “Safety Apparatus.”

Both patents in suit specifically state that the device is for use on a vehicle such as an aircraft or an automobile (trolley cars are out of style). Each device includes a reel or drum and a cable having one end connected to the reel and another to a pilot, operator or “**objects other than human bodies**” (Patent '233, Col. 7, lines 13-15, Ex. 1).

When you step on a brake of your automobile, a passenger on the seat beside you will normally move forward and may even hit the windshield. If he were the **object** connected to the cable, the cable would accelerate and there would be “* * * a sudden increase in the rotative speed of the trolley-reel” (as in the Ham patent) and the device would lock the reel and cable to hold the **object (passenger or trolley pole)** from further or dangerous movement. In the older trolley catcher patents, the trolley pole was prevented from doing “any damage to the trolley wire supports” (Ham, page 2, lines 103-104).

Your Honors probably wonder how the Patent Office made the horrible mistake of issuing the patents in suit. The answer is the trolley catcher patents to which attention has been drawn **were not cited by the Patent Office**. The Supreme Court was faced with a similar situation in the *Calmar, Inc. v. Cook Chemical Co.* case, 383 U.S. 1, 86 S. Ct. 684 (1966).

wherein an important reference (Livingstone) was not before the Examiner although the construction there shown was “fully disclosed and dedicated to the public in the Livingstone patent”.

For purposes of the trial, plaintiff **concocted a meaningless phrase** to describe the function of the safety apparatus of the patents in suit; plaintiff called it **“man-sensitive”** and by endless repetition, sold this phrase to the Trial Court. This meaningless phrase occurs 30 times in the Findings of Fact and even in Conclusion IV.

Invention cannot be predicated upon semantics. The phrase **“man-sensitive”** is meaningless since a piece of machinery **does not discriminate** as to who or what applies the effective force. The safety device will operate for man, woman, chimpanzee, a box of freight, trolley pole **or any other object** which applies accelerative force to the cable or strap connected to the reel. Patent '233 specifically states:

“This novel invention may be used in connection with objects other than human bodies, such as, for example, freight handling and the like.”
(Ex. 1, Col. 7, lines 12-15).

Plaintiff's president agreed with this statement by admitting **“that a human body is not needed”** and that mechanical or electro-mechanical means are used to test the patented devices. (R. Vol. III, p. 185).

Since objects “other than human bodies” operate the devices of the patents in suit (confirmed by testimony of the patentees in R. Vol. III, pp. 239, 297-298, 362), then it is clear that human bodies (instead of trolley poles or freight) would operate the devices of the expired trolley catcher patents which are in the public domain. Plaintiff is trying to use its patent like an accordion by expanding it for purposes of infringement but contracting it to avoid infringement. This Court must not allow plaintiff to assume contradictory positions.

Your Honors are all familiar with weighing scales. These scales do not discriminate — they will weigh a man, a woman or a box of freight. Is it invention to call the scale “**man-sensitive**” when a man actuates it? Or to call it “**freight-sensitive**” when a box of freight actuates the scale?

The Trial Court committed grievous and reversible error in being misled by plaintiff’s meaningless phrase. The Trial Court ignored the testimony of the patentees; it ignored the teaching of Patent ’233 in suit and even refused to add a finding correctly quoting the patent, thereby failing to include a finding which would fully advise this Court as to the facts. It appears that after mulling over this mystic phrase for over six months and having come to a decision, the Court closed its mind to the true facts and to the law.

HISTORY OF PATENTS IN SUIT.

The prosecution of the patents in suit before the Patent Office (Ex. 131), shows that the most pertinent prior art was **not** considered. However, all of the claims of Patent '233 were finally rejected (Ex. 131, pp. 40-41) on art (see Ex. D) which included:

Sharpe 2,370,921, who described a snubbing device (**safety device**) for permitting slow but preventing rapid movement of a cow during milking;

Scheur and Caouette 1,037,333 and 1,308,480 who showed similar **safety devices** wherein rapid movement of a cable braked but did not lock the cable to restrain a movable fire escape; Geohegan 2,403,653 and Nordmark 2,434,119 who taught the combination of an aircraft, a **safety device** including a reel, a cable and a **man** in a harness connected to one end of the cable.

Upon appeal to the Patent Office Board of Appeals, the patentees did **not** argue that they had a new combination; they argued that Scheur and Caouette were *velocity-operated* and *not responsive to acceleration*. The Board allowed the claims (Ex. 131, p. 90).

Further and more importantly, the Patent Office did **not** have before it the prior art patents to Ham, Burdon and Ricketts (Ex. D), each of which shows that it was old and well known to use an *acceleration-responsive* safety device to lock a reel and a cable (whose other end was secured to an object) to restrain an ob-

ject, and wherein the abnormal acceleration was sensed through the cable.

No presumption of validity attaches to the patents in suit since the more pertinent prior patents were not considered.

“Even one prior art reference which has not been considered by the Patent Office, may overthrow the presumption of validity, and, when the most pertinent art has not been brought to the attention of the administrative body the presumption is largely dissipated.”

Jacuzzi Bros., Inc. v. Berkeley Pump Inc., 191 F. 2d 632, 634 and note Page 637 (C.A. 9, 1957) and other similar cases.

Claims of the second Patent '234 in suit were also rejected “since the parts are defined in terms of the pilot’s body which is not a part of the device” (Ex. 132, pp. 46-67). At that time the patentees did not have the impudence to argue that **they invented a man** so they concurred in the requirement of the Patent Office that “limitations of the parts must be in terms of the other specifically included elements * * * should be defined in terms of the accelerated pull of the cable **not the body movement**” and promptly cancelled prior amendments and added that the device was “responsive to forces exerted by **pull on the cable**” and “due to an abnormal acceleration of the cable” (Ex. 132, p. 49). (Note: these forces could be generated by any object, man, freight, trolley pole, cow, fire escape, etc.).

But during trial, plaintiff ignored the limitation which was imposed by the Patent Office and which it accepted. Plaintiff now relies on “**man-sensitive**”, not **acceleration-sensitive**. Plaintiff befuddled the Trial Court who ignored the Patent Office record and the law.

“Here the patentee obtained his patent only by accepting the limitations imposed by the Examiner. The claims were carefully drafted to reflect these limitations and Cook Chemical is not now free to assert a broader view of Scoggin's invention.”

Graham v. John Deere Company of Kansas City, 383 U.S. 1, 86 S. Ct. 684, 702.

The documentary evidence (Exs. I to T) in this case, corroborated by unshaken testimony (R. Vol. III, pp. 1223-1267), leads to the conclusion that at best, plaintiff's patents are merely concerned with the possible **new use of old devices** taught by Ham, Burdon or Ricketts for restraining a man (instead of another object). Under well established rules of Patent Law, **the patents in suit must be held invalid**.

“It is well settled that mere application of an old device to a new use does not constitute invention. *Roberts v. Ryer*, 191 U.S. 150, 159; *Peters v. Hanson*, 129 U.S. 542, 543.”

Pevely Dairy Co. v. Borden Printing Co., 123 F. 2d 17, 19 (C.A. 9, 1941).

The Trial Court erred: its findings and conclusions are based on a deceptive and meaningless phrase (man-sensitive) and a disregard of statutory standards of invention.

SPECIFICATION OF ERRORS.

Defendants have set forth the errors committed by the Trial Court in their Concise Statement of Points on Appeal and Supplement thereto under Rule 17(6) (R. 1112), and rely on said errors as if restated here. In furtherance of the argument as hereinafter presented, the errors may be restated as follows:

1. The Trial Court **erred** in holding that both patents in suit are valid (Conclusion II, R. 942) and **failed** to apply the constitutional standard of invention of 35 U.S.C. §§101, 102 and 103 required by the Supreme Court and this Court of Appeals.

2. Findings 57 and 58 (R. 938) are **erroneous** and **contrary** to documentary facts and unrefuted testimony. These findings hold that the claims in suit do not read upon and are not anticipated by the Ham, Burdon and Ricketts patents (not cited by the Patent Office) whereas Exs. I through T and R. Vol. III, pp. 1223-1266 and 1319 establish such anticipation. This testimony stands unrefuted. **The equivalency of an inanimate object and a man to cause actuation is conceded by Patent '233 in suit.**

3. The Trial Court **erred** in finding that "**locking a man in his seat**" (Finding 63, R. 939-40). was a "**surprising result**". The patented device will be actuated by an "**object**" as well as **man**; the prior art will respond to a **man** as well as to an **object**. (R. Vol. III, pp. 231, 259, 293, 297-99 and 362-65). No unobvious, surprising or unexpected result is obtained as required by *A & P Tea Co. v. Supermarket Corp.*, 340 U.S. 147 (1950).

4. The Trial Court **erred** in finding that the **function** or **purpose** of the patented safety apparatus is markedly different from the purpose of the safety devices of the prior art patents to Ham, Burdon or Ricketts and that these patents are non-analogous art (Find. 56, R. 938). The primary function or purpose of the safety apparatus of plaintiff's patents and of such prior art is **to lock a cable** regardless of what object (man, freight, or trolley pole) is attached to and causes acceleration of the cable (R. Vol. III, pp. 298-9, 455, 902-4, 1116-18, 1177-78 and 1293-94). **Patents cannot deprive a mechanic from adapting old devices to uses suggested in prior patents.** *Skee-Trainer, Inc. v. Garelick Mfg.* (C.A. 7, June 8, 1966), 150 USPQ 7, 9, F. 2d, applying *Graham v. John Deere*, 383 U.S. 1, 86 S. Ct. 684, 689.

5. Finding 49 (R. 936) is in **error** in attempting to minimize the anticipating effect of the uncited Ham, Burdon and Ricketts patents by stating that these devices were heavy and bulky. Changes in metals used or in size are not inventive. The patents in suit do **not** specify sizes or weights as being critical. Make-weight arguments do not take the place of invention as established by plaintiff's Chief Engineer (R. Vol. III, p. 1742).

6. Findings 41 and 42 (R. 935) are in **error** since they disregard the facts that:

- (a) prior patents to Nordmark and **Geohegan et al.** (Ex. D) taught the **same combination** with a **safety device** which restrained a man;
- (b) prior patents to Ham, Burdon and Ricketts showed a safety device **identical** in construction and operation to that claimed in the patents in suit; and

- (c) disregard the law that the **substitution of an old device for a different device in an old combination of elements is not invention.**

7. The Court **erred** in Finding 48 (holding that the uncited Ham, Burdon and Ricketts patents were not as closely related to plaintiff's invention as the cited art (R. 936), because the Trial Court failed to note that the file history (Ex. 131, p. 90 and Ex. 132, pp. 21 and 33) shows that the cited art only showed *velocity-responsive* safety devices, whereas the Ham, Burdon and Ricketts patents show *acceleration-responsive* devices to which the claims in suit are drawn. That which the Patent Office believed to be a distinction is now demonstrated to be **old**.

8. The Trial Court **erred** and Finding 36 (R. 934) is misleading Your Honors in holding that the patents in suit are **basic** with respect to **man-sensitive** safety apparatus which is **acceleration-responsive**, as the Patent '233 (Ex. 1) on its face (Col. 7, lines 12-15) clearly admits that **objects other than human are equivalent**, and therefore the patented safety apparatus are **not basic** with respect to being sensitive only to a "**man**" but are merely directed to a safety apparatus which may be used in connection with other objects, such as a trolley pole, chimpanzee or the like, capable of accelerating the cable from the object to the safety apparatus and holding the object from further movement, **as confirmed by the co-inventor, Pfankuch** (R. Vol. III, pp. 297-98).

9. Findings 12 to 16, 19 to 22, 36, 49-53, 55, 56, 57, 59 to 63, 66, 67, 70 and 71 (R. 930-941) and Conclusion of Law IV (R. 942) in which reliance is made upon the concocted and meaningless phrase

“man-sensitive” or depend upon “acceleration-responsive” are misleading and **erroneous** and contrary to the facts. The patented devices respond to a force exerted by a pull on the cable and that pull can be by a man or any object, as in the prior art (R. Vol. III, pp. 297-98).

10. The Trial Court **erred** in apparently believing that since the patentees of the patents in suit and others did not consider the trolley catcher patents, such prior art patents were inapplicable as anticipation (Find. 52; R. 937). This Finding is in error because:

“It is also irrelevant that no one apparently chose to avail themselves of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search—a prudent and nowadays common preliminary to well organized research. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900).”

Graham et al. v. John Deere Company of Kansas City, et al., 383 U.S. 1, 86 S. Ct. 684, 703 (Feb. 1966).

11. The Trial Court **erred** in finding that at the time the inventions in suit were made, it would **not** have been **obvious** to one skilled in the art of “safety apparatus for protecting a man in his seat” that abnormal movement of a man could be sensed to cause the man to be locked in his seat at the very outset of the abnormal movement (Find. 53, R. 937) in view of the tests for determining **obviousness** set forth by the Supreme Court in *Graham v. John Deere Company of Kansas City, supra*, and in *A & P Tea Co. v. Supermarket Corp.*, 340 U.S. 147. The Trial Court further **erred** in this Finding in attempting to find

a **new art**, namely "safety apparatus for protecting a man in his seat" which is **old** as taught by Nordmark Patent 2,701,693, Ex. D.

12. The Trial Court **erred** in finding that secondary considerations or **sub-tests** such as commercial success and alleged recognition of the patents in suit (Finds. 65, 66, 67, 68, 69, R. 940-941) were **substitutes** for patentability and the test of obviousness under 35 U.S.C. §§102 and 103, as set forth by the Supreme Court in *Graham v. John Deere Co.*, *supra*, at 703.

13. Findings 43 and 44 (R. 935) are **erroneous** in holding that Wrighton and Cushman, **jointly** contributed to the invention of the improvement patent '234 because during the trial it was proven by cross-examination of Mr. Wrighton (R. Vol. III, pp. 387-402) that he did **not** invent anything in Patent '234 and that **Mr. Cushman** was the alleged **sole** inventor, as exemplified by Exs. AI and AJ and unfuted testimony of Mr. Gabriel (R. Vol. III, pp. 1273-1283).

14. Findings 50, 51, 55, 70 and 71 (R. 936-941) are clearly **wrong** because there is **no** evidence to support them. For example, Finding 50 is premised upon an alleged "multi-directional" response of the safety device, but such response can only occur when certain guides or "frames" are used, and such guides are **not** included in the claims in suit (conceded by plaintiff's engineer, Glauser, R. Vol. III, pp. 550-551, 554, 566, 570-571).

15. Finding 20 (R. 931) is in **error** because there is no competent evidence to support it. The Trial Court **erred** in admitting **hearsay**, without personal

knowledge, in response to leading questions, over defendants' objections (R. Vol. III, pp. 91, 92, 93).

16. The Trial Court **erred** in finding the four claims of the patents in suit valid and infringed (Find. 72, R. 941) as the proper tests of validity and infringement were not applied by the Trial Court in view of the rules and criteria of invention required by the Supreme Court and this Court of Appeals. Further **error** of the Court lay in failing to find no infringement because defendants' safety device more closely follows the teachings of prior art as the Ham patent.

17. Findings 38 and 72 are in **error** in finding infringement and that the Patent Office proceedings do not limit the scope of the patents in suit in view of plaintiff's interpretation of the alleged invention in the file histories (Exs. 131 and 132) in order to obtain the allowance of the patent claims in issue.

SUMMARY.

This Court **must** decide whether or not there is invention in utilizing an **old safety device** (Ham) for a different or new use (to restrain a man or occupant) where the **claimed combination** of elements (vehicle, safety device, cable and object) is old and in the **public domain** (Nordmark and Geohegan). A further question for Your Honors to decide is whether there can be an infringement where defendants' device **more closely follows** the teachings of the prior art patent to Ham which is in the public domain (See Chart 3).

Your Honors, in view of past cases on these same issues, should be compelled to hold that the Trial Court

has erred. In *William T. Alvarado Sales Co. v. Rubaloff*, 263 F. 2d 926 (C.A. 9, 1959), this Court was presented with exactly the same issue with similar facts being involved. Plaintiff's patent was directed to a turntable used as a check stand in grocery stores. The Trial Court held such patent invalid over prior art patents on a conveyor used as part of a paper milk bottle packaging machine for industrial use.

Your Honors affirmed the Trial Court and held at 928:

"The taking over of devices from one field of use to another does not constitute invention, even though they be put to a new use. More than a new advantage of the old component must be discovered in order to claim invention. *General Electric Co. v. Jewel Co.*, 326 U.S. 242, 249, 66 S. Ct. 81, 90 L. Ed. 43."

The four claims in issue of the patents in suit should also be held invalid on the same ground as Your Honors used in *Alvarado Sales Co. v. Rubaloff*, *supra*.

The prior art patents, Ham, Burdon and Ricketts (Ex. D), show that the patented devices defined in the claims in suit are **old**. Moreover, the four claims in issue read **element for element** on the prior art (Exs. I to T). The prior art and patented safety devices mechanically perform the same function—to lock the cable when subjected to abnormal acceleration. Whether a man or trolley pole (object) is used to accelerate the cable is **immaterial** to the device.

The Trial Court became **confused** on this very issue in writing its opinion (R. 903) approximately

nine months after the trial. In such opinion, the Trial Court correctly set forth §904.01(c), page 155, of The Manual of Patent Office Examining Procedure as follows:

“Analogous Arts”

“Not only must the art be searched with which the invention claimed is classifiable, but also all analogous arts regardless of where classified.

“The determination of when arts are analogous is at times difficult. It depends upon the necessary essential function or utility of the subject matter covered by the claims, and not what it is called.

“For example, a tea mixer, and a concrete mixer are for the same art, namely, the mixing art, this being the necessary function of each. Similarly a brick-cutting machine and a biscuit-cutting machine have the same necessary function.”

Since a mixer is a mixer whether used on tea or concrete, and a cutting machine is the same whether it cuts bricks or biscuits, **a safety device is the same whether used with man, beast or inanimate objects.** But the Trial Court became confused, and erroneously held:

“Even if we assume a relation and a similarity of elements in a safety reel and a trolley-catcher, the purposes of the two devices are unrelated with in the rule above set forth.” (R. 903).

Here, the Trial Court **acknowledged** that the devices of the patents in suit and of the prior art (Ham, Burdon and Ricketts) have the same elements that cooperate in the same relationship. There is no evidence nor did plaintiff argue to the contrary.

The **purpose or function** of the patented safety devices **is to lock a cable**, which was uniformly established at the trial (R. Vol. III, pp. 298, 455, 902, 1116-17, 1177-78, 1293) and which is the same purpose as the prior art patents. Therefore such prior art patents are analogous art.

However, plaintiff distracted and confused the Trial Court by concocting the false and misleading term “**man-sensitive**” thereby beclouding the fact that all of these safety devices have the same function and use.

The patented and prior art safety devices for locking a cable function in the **same manner** and have the **same purpose**, whether they are used to restrain a man, trolley pole, chimpanzee or any other object. In the same manner, machines for cutting objects have the same purpose whether the object is a brick or biscuit and machines for mixing objects have the same purpose whether the object is tea or concrete. (Trial Court's Opinion R. 903).

The Supreme Court recently set forth its view on “pertinent” or analogous art in *Graham v. John Deere Co.*, *supra*, at 86 S. Ct. 702-703. The patentee argued that a prior art patent relating to liquid containers having pouring spouts was “not in the pertinent art” as compared to the patented insecticide pump sprayer. In response to this argument, the Supreme Court held at 703:

“The problems confronting Scoggin and the insecticide industry were not insecticide problems; they were mechanical closure problems. Closure devices in such closely related art, as pouring spouts for liquid containers are at the very least pertinent references. See Vol. II Walker Patents §260 (Deller Ed. 1937)”.

In the present case, the problems of the patentees **were to lock a cable** when abnormally accelerated by an object. This was the **same** problem that confronted Ham, Burdon and Ricketts 50 years before.

To hold the patents in suit valid, Your Honors would be **endorsing** the policy of issuing additional patents by the Patent Office on new uses of the old locking or safety devices as disclosed in the prior art patents to Ham, Burdon and Ricketts (Ex. D). Should additional patents be granted if these old devices were used with objects other than a man or a trolley pole? The **negative** answer to this question emphasizes the gross error of the Trial Court in holding that there is an invention in using an old safety device for locking a cable to restrain only a man and not any other object such as freight (as stated on the face of Patent '233, Col. 7, lines 12-15) or a trolley pole (Ham, Burdon or Ricketts patents)

How have the alleged patented devices produced such **unusual** or **surprising** consequences or **added** to the total stock of knowledge that represents an invention in the constitutional sense in view of the criteria of the Supreme Court in the *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 240 U.S. 147, 71 S. Ct. 127, 95 L. Ed. 162?

These patents in suit are invalid since:

“It follows that though a device may be new and useful it is not patentable if it consists of no more than a combination of ideas which are drawn

from the existing fund of public knowledge, and which produces results that would be expected by one skilled in the art. A public grant of the private power to exclude others from making, using, and selling such a device simply 'withdraws what already is known into the field of its monopoly and diminishes the resources available to skilled men.' * * * *"

Griffith Rubber Mills v. Hoffar, 313 F. 2d 1, 3 (C.A. 9, 1963).

Another issue erroneously decided by the Trial Court is **how** defendants' inertia or acceleration-responsive safety device, which employs elements and combinations and utilizes the **same** mode of operation and obtains results as taught by the prior art safety devices for locking a cable, such as Ham (see App. C, p. 3), can be an infringement of the patents in suit.

As illustrated in Appendix C, page 3, defendants' alleged infringing device employs **similar** elements, which operate and produce **similar** results as the prior art patent to Ham. The safety devices used by Ham and defendants, if considered to be an infringement, require this Court to reverse the Trial Court and hold that the Ham patent **anticipates** the patents in suit.

"There is another test as to the validity of the second claim. If the Balch, Everett, Wilson, or Ferris patents, or even the umbrella, were subsequent in date to that of the Hall patent, they would

constitute an infringement thereof, for the rule is well established that 'that which infringes, if later, would anticipate if earlier'. *Peters v. Active Mfg. Co.*, 129 U.S. 530, 537; *Thatcher Heating Co. v. Burtis*, 121 U.S. 286, 295; *Grant v. Walter*, 148 U.S. 547, 554."

Knappp v. Morss, 150 U.S. 221, 228 followed in many cases, such as:

Sperry Rand Corp. v. Knappp-Monarch Co., 307 F. 2d 344, 348 (C.A. 3, 1962);

Application of Slayter, 276 F. 2d 408, 411 (C.C.P.A., 1960);

Smith-Blair Inc. v. Dresser Industries, Inc., 201 Fed. Supp. 458, 464 (D.C. N.D. Cal., 1961).

The patents in suit are invalid; they contain nothing new or inventive over the prior art.

QUESTIONS PRESENTED.

The points on appeal (R. 1112) and the preceding specification of errors may be condensed into ten questions for determination by this Court:

1. Do the four claims in issue of the patents in suit read upon and attempt to **re-patent** the devices shown in expired prior patents to Ham, Burdon and Ricketts?

(The evidence on this is in the **affirmative** and uncontradicted, See Exs. I to T.)

2. Is the **same** result or purpose (restraint from abnormal movement) attained by each of the prior

art patents to Ham, Burdon, Ricketts, Nordmark, and Geohegan?

(The evidence shows that all devices (patented and prior art) are cable locking devices and requires an **affirmative answer**. Findings 42, 49, 50 and 53 are in error.)

3. Can there be an invention in the claims in issue of the patents in suit which only require a new or different use of an **old safety device**?

(Well established rules of patent law compel the answer — **no invention**.)

4. Can a member of the public be restrained from normal use of skills in adapting what is in the **public domain** in accordance with prior patents? See *Griffith Rubber Mills v. Hoffar*, 313 F. 2d 1, 3 (C.A. 9, 1963).

(A patent which deprives the public of its vested rights is **invalid**. That which infringes, if later, **anticipates** if earlier.)

5. Would it be **obvious** to a man skilled in the art of safety devices to use a device as shown in Ham, Burdon or Ricketts as a substituted equivalent for the safety devices shown in either Nordmark or Geohegan prior art patents, §103 Title 35 U.S.C.?

(It is submitted that the facts and the law requires an **affirmative answer** and a **reversal** of the Trial Court's Judgment.)

6. Do the claims in issue of the patents in suit define a patentable invention (conforming to each of

the statutory requirements of novelty, utility and non-obviousness §§ 101, 102 and 103, Title 35 of the U.S.C.) in the light of all **prior** knowledge and patents and the ordinary skill of men in the art at the time the alleged invention was made?

(It is urged that the Trial Court made Findings that are contrary to the evidence and the judgment must be **reversed**.)

7. As a matter of **law**, did the Trial Court apply the correct criteria and standard of invention required by the Constitution and rulings of the Supreme Court as set forth in the *A & P Tea Co.* case and *Graham v. John Deere Co.* case as well as the prior decisions of this Court?

(It is urged that this must be answered in the **negative** and that the claims in issue in both patents in suit must be held invalid and not infringed. This question encompasses Points on Appeal 20-23, 26-41, 47-67. Specific erroneous Findings are 40-42, 48-53, 56-58, 63, 64, 68 and 72.)

8. Is Patent '234 invalid because statutory provisions were **not** complied with and a **false oath** was filed naming Wrighton as co-inventor whereas the subject matter was "an independent effort on Mr. Cushman's part". (R. 338)?

(Findings 43 and 44 are **wrong** and defy the statutes and the facts.)

9. Can defendants' device be an infringement when it **follows** the teachings of the prior art rather than the patents in suit?

(The Trial Court ignored the uncited prior art teachings of mechanical devices **for locking cables** in finding infringement. The answer to this question must be in the **negative**.)

10. Can the claims in issue be infringed by defendants' device which employs a **different** mode of operation and **omits** essential elements (separate inertia) in view of the development of the patented devices and the file history of the patents in suit?

(The law is clear that there can be no infringement where the device has mechanical differences or a difference in mode operation or a file wrapper estoppel exists to estop plaintiff from charging infringement. Findings 38, 71 and 72 are **in error**.)

THE CLAIMS OF THE PATENTS IN SUIT ARE ANTICIPATED AND INVALID.

The purported invention of the patents in suit requires a safety device in **combination** with a vehicle, cable and an object. Combination claims **rarely** involve invention. Here, plaintiff did **not** invent a vehicle (such as an airplane or a trolley car), did **not** invent an object (such as a man or a trolley pole), did **not** invent a safety device including a reel and certainly did **not** invent a cable having one end connected to the reel and the other to an object.

Let us look at Exhibits I and R reproduced here in Appendix C, pages 1 and 2. These Exhibits show that **each** of the **mechanical means** of claim 9 of the first patent in suit and claim 5 of the second patent in suit are found in and anticipated by the prior patent to Ham (Ex. D), which was not cited by the Patent Office.

The **only** purported novelty of these claims lie in that an **“occupant”** or **man** is attached to and adapted to be restrained by the cable. On this immaterial distinction, plaintiff has concocted the meaningless **“man-sensitive”** argument which misled the Trial Court into erroneous findings and conclusions.

The alleged “basic” patent in suit **concedes** that **“objects other than human bodies”** may be used (Patent '233, Col. 7, lines 12-15) and this equivalency was confirmed by plaintiff's witnesses (R. Vol. III, pp. 259, 297-98, 362)

since	occupant=man=object;
and	object=trolley pole (of Ham);
therefore	occupant=trolley pole.

There is complete anticipation in view of these established facts. Each of the conceded equivalents is capable of exerting a force upon the cable to accelerate the cable and lock it so as to

“stop the further ascent (movement) of the trolley instantly” (Ham);

or “against further movement outwardly” (Patent '233, claim 9);

or “restrain movement” (Patent '234, claim 1).

These results are expected and obvious. The results or purposes are the **same** whether the cable is connected to a man, to a trolley pole or to a box of freight. The errors in the Findings are self-evident. Finding 56 states:

“The purpose of plaintiff’s and defendants’ man-sensitive safety apparatus is markedly different from the purpose of the trolley-catching devices of the prior patents and thus, these patents are non-analogous art.”

Finding 53 states:

“At the time the inventions in suit were made, it would not have been obvious to one skilled in the art of safety apparatus for protecting a man in his seat * * *.”

All of these equivalent objects have mass; they exhibit inertia; they can generate accelerative forces. The reel of the safety device and the cable attached to it do **not** care **what object** is attached to them and produce the actuating force.

The **deadly parallel** between the prior art patents not cited by the Patent Office, and each of the claims in issue, is established by irrefuted evidence. Defendants’ experts, Gabriel (R. Vol. III, pp. 1223-1267) and Swedlow (R. Vol. III, pp. 1313-1319) testified in detail that claims 7 and 9 of Patent '233

and claims 1 and 5 of Patent '234 were **fully anticipated** by each of the prior art patents to Ham, Burdon and Ricketts (Ex. D). These were **not** considered by the Patent Office. Exs. I through T clearly and graphically illustrate the testimony of both Gabriel and Swedlow on the **anticipation of all the claims in issue**.

Normally, in a patent trial, there is some attempt to refute evidence and testimony introduced by defendants which shows anticipation of the alleged inventions. At **no** time during the trial, however, did plaintiff cross-examine Messrs. Gabriel and Swedlow on their testimony of the anticipation of the claims in issue by the Ham, Burdon and Ricketts patents. **Exs. I through T were never refuted by plaintiff.**

The Trial Court completely **ignored** this un rebutted and unrefuted testimony in Exs. I through T introduced by defendants. On this one point alone, the Trial Court's Findings, such as 27, 53, 56 and 58 (R. 932, 937, 938), are clearly erroneous since the only evidence is to the contrary.

"* * * Most important, there is not a scintilla of evidence in the Record that would support such a conclusion."

Troy Company v. Products Research Company,
339 F. 2d 364 at 366 (C.A. 9, 1964).

These uncontested facts establish that the '233 patent in suit is not "basic" as erroneously stated in

Findings 17, 25, 42, 62 and 69 (R. 931, 935, 932, 939, 941). It is submitted that the Trial Court was misled by the misleading and beclouding tactics employed by plaintiff and substituted its own mistaken opinion for the true facts and evidence. While it was normal for the Trial Court in this case to request the plaintiff to prepare the Findings (in which no changes were made by the Trial Court), this does not excuse the trial judge from his duty to carefully determine the accuracy of the proposed Findings, particularly when errors are called to his attention by objections and motion to amend (R. 947; denied R. 985). Exs. I and R appended hereto (App. C, pp. 1 and 2) speak for themselves. **The judgment should be reversed.**

THE CLAIMS IN ISSUE DO NOT
RELATE TO INVENTION.

Exhibit D contains the prior art patents and among them is Nordmark *et al.*, Patent 2,701,693 (not cited in Patent '233). The disclosures of this patent are combined with those of Geohegan on the Chart 1 provided on the opposite page of this brief, in order to permit Your Honors to have a condensed comparison between the patents in suit and the prior art patents, including Ham.

The Nordmark *et al.* patent uses the **same combination of elements** as the patents in suit. It relates to a safety device particularly "an automatic inertia-operated reel for taking up the cable on a shoulder harness by means of which an occupant of an airplane or other vehicle is secured in his chair in the event of a crash" (Col. 1, lines 16-19). One end of the cable is secured to the drum of the device (Col. 2, line 75) and the other to the harness worn by the man (Col. 2, lines 28-34).

The function or purpose of the entire combination is to secure the man in his seat "so that he will not be thrown sideways or forward" (Col. 1, line 39 and Col. 5, lines 52-53). The purpose or function of the combination is therefore **identical** to that of the patents in suit. Also, please note that this Nordmark device is sensitive to the normal movement of the man and "the drum 26 pays out or takes up the harness cable 8 as necessary" (Col. 5, lines 1-3).

A mechanic of ordinary skill is asked to make a similar device, having the same purpose of function, but which will not be a Chinese copy of Nordmark. Such

**COMBINATION USED IN PATENTS IN SUIT IS OLD
AND IN PUBLIC DOMAIN**

	PATENTS IN SUIT	NORDMARK AND GEOHEGAN	HAM
VEHICLE	"moving vehicles such as aircraft and automobiles" (Exh. 1, Col. 1, l. 18) (Exh. 2, Col. 1, ll. 17-18)	"aircraft or any other vehicle "	moving vehicle such as a trolley-car
SAFETY DEVICE INCLUDING REEL	inertia-operated safety device including a reel, responsive to abnormal acceleration on cable (Exh. 1, Col. 6, l. 15) (Exh. 2, Col. 4, l. 69)	inertia-operated safety device including a reel, responsive to acceleration on device	inertia-operated safety device including a reel, responsive to abnormal acceleration on cable
CABLE	cable or equivalent strap, wire, rope, etc. (Exh. 1, Col. 8, l. 22) (Exh. 2, Col. 6, l. 17)	cable or straps	cable , rope or line
OBJECT ATTACHED TO CABLE	Man or any other object "This novel invention may be used in connection with objects other than human bodies, such as for example, freight handling and the like." (Exh. 1, Col. 7, ll. 12-15)	"Man"	trolley pole ("an object other than a human body")
FUNCTION, PURPOSE RESULT	to lock cable , prevent feeding out of cable and hold man or object from further movement	to lock cable against paying out and hold man from further movement	to prevent feeding out of cable and hold trolley pole from further movement

mechanic does what the Supreme Court suggests and avails himself

“* * * of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search.”

Graham v. John Deere Co., 86 S. Ct. at 684, 703.

The mechanic finds a number of patents on safety devices among them Ricketts 1,393,570 (Ex. D) which responds to inertia and “is not dependent upon speed but operates in response to sudden variations and acceleration” as “when the trolley pole jumps the feed wire” (p. 3, Col. 2, lines 58-75). But also finds and may prefer the safety device of Fig. 1 of Ham 700,763 (Ex. D) because the working parts are “balanced.” Both the Ham and Ricketts safety devices are for use on a vehicle, both employ a reel or drum, both have a cable with one end connected to a drum and the other to an object which causes the cable to be locked “on the application of any sudden increment force” (Ricketts, Col. 2, line 77 and see Col. 1, lines 40-45). The Ham (or Ricketts and Burdon) patent in the prior art is in the last column on appended Chart 1.

Since the Ham, Ricketts and Burdon patents have expired, the skilled mechanic can substitute any one of the Ham, Ricketts or Burdon safety devices for the safety device described by Nordmark, placing it in exactly the same relationship with respect to the man and the vehicle as in the Nordmark patent. The two devices perform the same function and the purpose of the Nordmark patent is performed at least as well (if not better) than with the Nordmark safety device.

No changes in the relationship of the elements are required to make this substitution of one safety device for another in the general combination.

Where are the prerequisites of patentable novelty, utility and non-obviousness which are necessary to a valid patent? The mechanic has not created a new combination of cooperative elements—he **still has the same old combination as indicated by Chart 1.** He has not produced a new or unexpected result—the device still takes up and pays out cable to accommodate normal movement of the object at the end of the cable; the device only locks the cable to restrain the object from movement when the cable suddenly accelerates under the influence of a force applied by the object. The vehicle still moves (or crashes).

The mechanic has not created any new and useful means, he has simply used mechanical skill expected of his calling to produce an old result by the substitution of equivalent devices in an old combination. What he did was not invention; what the patentees of the patent in suit did, was not invention.

“All he (the patentee) did was, by the use of known equivalents for some of the elements of former structures, to make it somewhat better than it was ever made before. This is not patentable.”

Crouch v. Roemer, 103 U.S. 797 at 799.

This Court has repeatedly held patents invalid where the improvement involved a substitution of mechanical equivalents, as in *Dailey v. Lipman, Wolfe and Co.*, where Your Honors states:

“Did plaintiff by using needle points merely substitute an equivalent for the studs? That the ques-

tion as stated is correct may be seen from the following quotation from *Smith v. Nichols*, 21 Wall. (88 U.S.) 112, 119, 22 L.Ed. 566:

‘but a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain the patent.’ ”

Dailey v. Lipman, Wolfe and Co., 88 F. 2d 362 at 364.

The mechanic of 1958 or 1960 had better tools, stronger and lighter metals and a greater fund of prior knowledge at his command than Ham. But these factors do not constitute invention. The claims of the patents in suit are not limited to specific metals, weights, proportions or critical and exotic relationships which produce a new device; instead, they read directly upon every mechanical element of the Ham, Burdon and Ricketts safety devices, as clearly demonstrated by Exhibits I and R appended hereto (Appx. C, pp. 1 and 2).

Even if it is assumed that the claims of the patents in suit distinguish by some minor mechanical structural requirement from the safety devices of Nordmark and Geohegan *et al.*, they do not distinguish from the Ham, Burdon and Ricketts devices which were not before the Patent Office.

35 U.S.C. §103 entitled “Conditions for Patentability”; nonobvious subject matter, provides:

“A patent may not be obtained * * * if the differences between the subject matter sought to be

patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”

As pointed out hereinabove, the expected, obvious and uninventive expedient of a man of ordinary skill is to substitute a mechanical equivalent. **For this act, a patent may not be obtained.**

The Supreme Court has stated that 35 U.S.C. §103 should be approached as follows:

“While the ultimate question of patent validity is one of law, *A & P Tea Co. v. Supermarket Corp.* supra, at 155, the §103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under §103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.”

Graham v. John Deere Co., 86 S. Ct. at 694.

Your Honors, using the above guidelines, in the light of the documentary facts and evidence, should readily conclude that the subject matter of the claims of the patents in suit is obvious, non-inventive and not patentable.

Unfortunately, the Trial Court did not make Findings which discuss “the differences between the prior art and the claims at issue” as directed by the Supreme

Court. Instead, the Court **ignored** the identity of the claims at issue and the prior art as demonstrated by Exhibits I through T and Appendix C, pages 1 and 2. The only Finding relating to “obviousness” is a flat statement with no explanation (Find. 53, 2nd sentence) and that Finding shows that the Trial Court was not applying the proper test and committed reversible error. A conclusion of obviousness is also supported by the testimony of Gabriel (R. Vol. III, pp. 1556-1557).

Since that which is claimed in the patents in suit is **an old combination**, obtained by simple substitution of one mechanical device for another similar device operating in its normal and expected manner to produce an expected result, the Trial Court committed reversible error in signing Findings referring to the '233 patent in suit as being “basic”. Findings 17, 25, 42, 62 and 69 are clearly wrong.

If it is assumed (without conceding) that the claims in issue contain some minor shred of invention, they must be construed in view of their limited contribution and not entitled to broad scope. Their claims are for old combinations and to prevent any broad interpretation of such claims, the Supreme Court has stated:

“. . . and to prevent extension of the patent's scope beyond what was actually invented, courts have viewed claims to combinations and improvements or additions to them with very close scrutiny. Cf. *Lincoln Engineering Co. v. Stewart-Warner Corp.* 303 U.S. 545, 549-51.”

Halliburton Co. v. Walker, 329 U.S. 1, 10.

This Court has applied this rule and has always carefully examined patent claims which only set forth the combination of old elements.

“A strict construction of a combination of old elements is required of our courts.”

Continental Connector Corp. v. Houston Fearless Corp., 350 F. 2d 183, 191 (C.A. 9, 1965).

In the light of these rules, Conclusion of Law IV stating that the claims of the patents in suit “are entitled to broad scope” is completely unjustified and wrong.

COMMERCIAL SUCCESS IS NOT A SUBSTITUTE FOR INVENTION.

It is believed that the Trial Court was misled by plaintiff’s repetitive chatter about “**man-sensitive**”, ignored the importance of the Ham, Burdon and Ricketts patents, ignored the fact that these patents were not before the Patent Office, and did not realize that “patentability is dependent upon three explicit conditions: novelty and utility as articulated and defined in §101 and §102, and nonobviousness, the new statutory formulation as set out in §103” (*Graham v. John Deere Co.*, 86 S. Ct. at 691). The Trial Court did not apply the guidelines enunciated by the Supreme Court and instead was impressed by plaintiff’s alleged commercial success (assuming that there is competent evidence in support thereof). The Supreme Court indicated that secondary considerations, such as commercial success, long felt want, etc. might be utilized to give light to the circumstances surrounding the origin of the subject matter, but deemed §103 “a more practical test of patentability” and that the inquiry “must be beamed

with greater intensity on the requirements of §103” (at pp. 693 and 694).

This Court should be aware that plaintiff’s alleged commercial success is minimal at best. The patents in suit have not been litigated heretofore and licensees were obtained on minimum terms without any settlement or recovery for past damages. No royalties were ever received under the United States license, Exhibit 18 (R. Vol. III, pp. 138-139) and minimum royalties at the time of trial had even ceased under the other United States license, Exhibit 17 (R. Vol. III, pp. 138, 139). Finding 65 is overreaching and in error in stating that “substantial royalties” were paid to plaintiff.

The foreign licenses (Exs. 19, 21 and 23) should be disregarded as irrelevant and immaterial. These licenses relate to foreign patents and there was no testimony as to exactly what was covered by them. Moreover, the foreign licenses involved alleged know-how and technical services to be rendered to the licensees by plaintiff and whatever sums were paid were not allocated to royalties but included an unknown proportion for the services. Finally, under Exhibits 21 and 23, the licensees only paid plaintiff the bare minimum of \$500 and no more (R. Vol. III, pp. 155-158).

Commercial success is not a substitute for invention.

“The Court of Appeals and the respondent both lean heavily on evidence that this device filled a long felt want and has enjoyed commercial success. But commercial success without invention will not make patentability.”

Great A & P Tea Co. v. Supermarket Equipment Corp., 340 U.S. 560 at 567.

Reliance upon more rapid locking which is deemed “an important sales feature” (Find. 31), high pressure salesmanship or threat of litigation that results in a license, does not take the place of true invention and patentability. It would appear that plaintiff’s licensees found it to be less expensive to take a license than fight a lawsuit, but this does not prove commercial success nor does it prove invention.

“* * * It is often less troublesome to buy one’s peace from a possessor of many patents than to enter into long drawn and expensive litigation.”

Cleveland Trust Co. v. Osher and Reiss, 109 F. 2d 917, 922 (C.A. 2, 1940).

This Court has repeatedly found patents invalid and disregarded commercial success, calling it a make-weight.

“We have repeatedly held that commercial success, however great, is but one factor in proving originality, i.e., invention. We have described it as a ‘make-weight’.

“This is all valid evidence of success, but it does not necessarily prove such success was proximately and solely caused by the genius of the invention.”

Monroe Auto Equipment Co. v. Superior Industries, Inc., 332 F. 2d 473 (C.A. 9, 1964).

To the same effect:

Patriarca Mfg. Inc. v. Sosnik, 278 F. 2d 389 (C.A. 9, 1960);

Pressteel Co. v. Halo Lighting Products, Inc., 314 F. 2d 695 (C.A. 9, 1963);

Jaybee Mfg. Corp. v. Ajax Hardware Mfg. Corp., 287 F. 2d 228 (C.A. 9, 1961).

FALSE OATH RENDERS PATENT '234 INVALID.

The Trial Court disregarded statutory provisions and the facts in holding that Patent '234 was "duly and legally issued" and that "Messrs. Wrighton and Cushman jointly contributed to the invention of the improvement patent." (Finds. 9 and 43). Actually there **was no joint invention** and the statutory requirements were not complied with.

"The inventor must comply with the conditions prescribed by law."

Consolidated Fruit Jar Co. v. Wright, 94 U.S. at 96, 97.

"It is admittedly a fundamental principle of patent law that a valid patent may only issue to the first and original inventor."

International Carbonic Engineering Co. v. Natural Carbonic Products, 57 Fed. Supp. 248 at 258, aff'd 158 F. 2d 285 (C.A. 9).

35 U.S.C. §102 entitled "Conditions for Patentability; novelty and loss of right to patent", reads as follows:

"A person shall be entitled to a patent unless —

(f) he did not himself invent the subject matter sought to be patented."

35 U.S.C. §115 reads as follows:

"Oath of Applicant. The applicant shall make oath that he believes himself to be the original and first inventor of the process, machine, manufacture, or composition of matter, or improvement thereof for which he solicits a patent;"

Now let's look at the facts. More than one year before the application for Patent '234 was filed, **Cushman** had completed a physical model, Exhibit 64 and drawing, Exhibit 65, both dated 11/20/52 and marked "Made by C. E. Cushman". In answer to the question, by plaintiff's counsel on direct examination, as to who made Exhibit 64 (the physical, operating model), Mr. Wrighton answered "Mr. Cushman" (R. Vol. III, p. 337) and further testified that:

"Yes, this was an independent effort on Mr. Cushman's part." (R. Vol. III, p. 338).

Wrighton testified he operated Exhibit 64 in 1952 (R. Vol. III, p. 340). That Exhibit 64 successfully operated was demonstrated on three separate occasions during trial by plaintiff's own witness, Glauser (R. Vol. III, pp. 729, 816-817).

There is no question but that Exhibit 64 made **independently by Mr. Cushman** answers all of the requirements of claims 1 and 5 of Patent '234. This is established by Exhibits AI and AJ and the testimony of Gabriel (R. Vol. III, pp. 1273-1283) wherein Mr. Gabriel testified:

"Q. Do you therefore find each of the elements, their function and result of claim 1 of the Patent '234 in suit here, which allegedly was invented by two men, Wrighton and Cushman, in the disclosure 64 and Model 65 designed only by Mr. Cushman way back on November 20, 1952?
A. Yes, I do.

Q. And this is exemplified on Exhibit AI, is that correct? A. That is right. The drawing on Exhibit AI is as closely as he could make it a copy of the drawing Exhibit 65." (R. Vol. III, p. 1278).

Mr. Gabriel's testimony was corroborated by Wrighton who truthfully and correctly found each of the elements of claims 1 and 5 in Exhibits 64 and 65 (R. Vol. III, pp. 395-406).

This evidence and the exhibits clearly establish that Wrighton "did not himself invent the subject matter" as required by 35 U.S.C. §102(f); he certainly was not the original or first inventor, or any inventor of the subject matter and therefore the oath filed with the application was false. The oath (see Ex. 132, p. 16) alleges that Wrighton and Cushman jointly invented the device. **This oath was false.**

Statutory requirements cannot be lightly dismissed. The public interest is involved in every patent; the public should not pay tribute under patents which were not legally issued in strict compliance with the patent laws. These requirements cannot be waived by agreement between individuals.

"* * * No private agreement or other act can create as the first inventor one who in truth was not so."

U.S. Pipe and Foundry Co. v. Woodward Iron Co., 327 F. 2d 242 (C.A. 4, 1964).

It is notable that plaintiff did **not** offer a shred of evidence to contradict the above facts. There was **no** testimony of joint inventorship; all Wrighton did was to see the model and drawing after they were completed by Cushman on November 20, 1952 (R. Vol. III, p. 405).

On the facts and the law, Findings 9 and 43 are in error and Patent '234 is invalid and the complaint based thereon should be dismissed.

DIFFERENT USE OF OLD DEVICE IS NOT PATENTABLE.

The acceleration-responsive apparatus claimed in the patents in suit are structurally and functionally the same as the acceleration-responsive safety apparatus disclosed in Ham, Burdon or Ricketts patents (Exs. I to T). Plaintiff was reduced at the time of trial to argue that this old safety device was new and inventive because it had never been used with a man before. To restrain a man or "occupant" with an old safety device instead of restraining another object (such as a trolley pole) was merely a **different but analogous use** for the old safety device that was available in the prior art.

Plaintiff's argument is fallacious. The same contention was presented and dismissed in *Page v. U.S. Divers Co., Inc.*, 235 Fed. Supp. 554 (S.D. Cal., 1964) aff'd by this Court 361 F. 2d 478 (June 20, 1966) wherein the Court held:

"* * * and it is well settled that to use an old device for new and analogous purposes is not invention *Fernandez v. Phillips* (CA 9, 1943) 136 F.2d 404; *Cuno Corp. v. Automotive Devices Corp.* 314 U. S. 84 (1941). The use of one way valves for handling and controlling fluids must of necessity be considered an analogous art."

This Court has repeatedly held that a **different use of an old device is not invention**:

"If, however, the devices are structurally and functionally similar, the fact that the Wright apparatus was intended for attachment to the outside

of the casing would not be material on the question of invention. Mere application of a mechanical equivalent to another use is not invention. *Pevely Dairy Co. v. Borden Printing Co.*, 9 Cir. 123 F.2d 17; *John Bean Mfg. Co. v. Creagmile*, 9 Cir. 123 F. 2d 182."

Hall v. Wright, 240 F. 2d 787 (C.A. 9, 1957).

Other examples of analogous art or of different uses of old devices which were not patentable include: the adaptation of a method of insulating ships was held analogous to and not inventive over the insulation of houses in *Slayter v. Stebbins-Anderson*, 117 F. 2d 848 (C.A. 4); an ice cream freezer was analogous to apparatus for preserving fish by a freezing mixture in *Brown v. Piper*, 91 U.S. 37; and the use of flywheels on phonograph machines or photographic sound film recorders was not inventive in *Altoona Theatres v. Tri-Ergon Corp.*, 294 U.S. 464.

"'It is settled * * * that the application of an old process or machine, to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.' *Pennsylvania Railroad Co. v. Locomotive Truck Co.*, 110 U.S. 490, and cases there cited."

Blake v. San Francisco, 113 U.S. 679 at 682.

The patents in suit are invalid because there is no invention and the Trial Court erred as a matter of law, in finding invention.

DEFENDANTS' DEVICE FOLLOWS PRIOR ART — NO INFRINGEMENT.

The Trial Court completely ignored that defendants' device followed the teachings of the prior art more closely than the patented devices. The Chart appended hereto (Appx. C, p. 3) for the convenience of Your Honors compares defendants' device with the prior art patent to Ham, Figure 3.

It will be immediately obvious from comparing pages 1, 2 and 3 of Appendix C, that defendants' device and the Ham device are quite different than the patented devices in patents '233 and '234. The patented devices are complicated, require a separate **flywheel or inertia element**, and in general have no similarity with defendants' and the Ham device as shown on page 3 of Appendix C.

It is obvious from comparing pages 1, 2 and 3 of Appendix C that defendants never copied the patented devices and that Finding 71 (on willful and deliberate infringement) is clearly erroneous as there is no evidence to support it.

It is further obvious from page 3 of Appendix C that defendants' device more closely follows the prior art device of Figure 3 in the Ham patent. As seen on page 3 of Appendix C, defendants' and Ham's devices employ a rotatable reel on which the cable or strap is wound, fixed locking teeth, a locking pawl carried by the rotatable reel, and a spring biasing the pawl into the normal or unlocked position. When the cables or straps move the reels too quickly or with abnormal movement or acceleration, then the pawls pivot outwardly against the bias of the springs and into contact with the fixed

locking teeth, thus stopping further movement of the reels and the cables or straps.

In comparison, the patented devices utilize a great many elements, none of which includes the simple, movable, **spring biased pawl** principle employed in the devices of defendants and Ham.

The Trial Court ignored the fact that defendants' device more closely followed the Ham device than the patented devices and erred in finding infringement.

With the same facts, this Court has repeatedly held that defendants' device could not be an infringement.

"The appellee points out that its alleged infringing device follows the teaching of the prior art more nearly than the patent claims in dispute. 'Hence, appellee claims that it does not infringe, and that the patent claims 13 and 14 are invalid. The trial court so held.' "

Crowell v. Baker Oil Tools, Inc., 153 F. 2d 972, 982 (C.A. 9, 1946).

Also see:

R. H. Baker & Co. v. Smith-Blair, Inc., 331 F. 2d 506, 510 (C.A. 9, 1964).

The other Circuit Courts of Appeal uniformly agree with this Court:

"To allow patentee now to claim every means for equalizing the strain on both sides of vehicles would allow him to extend his invention to include the prior art. This he cannot do."

Huntman Stabilizer Corp. v. General Motors Corp., 144 F. 2d 963, 967 (C.A. 3, 1944).

“[I]t would seem to be clear that the appellees follow Van der Grinten (prior art patent) and so do not infringe.”

Kalle & Company, et al. v. The Multago Company, 109 F. 2d 321, 327 (C.A. 6, 1940).

“Defendant learned everything it needed from Largos (prior art) in this detail. It does not infringe.”

Cosco Products Corp. v. Sinko Tool & Mfg. Co.
116 F. 2d 119 (C.A. 7, 1940).

Also see:

Scott Paper Co. v. Carcalus Co., 326 U.S. 242.

In view of these facts and law, this Court should be compelled to reverse the Trial Court and find no infringement provided the claims in suit are not held invalid in the first instance.

This Court should be aware that the first patent in suit '233 issued with thirteen claims and the second patent in suit '234 issued with fourteen claims. Plaintiff knew that its patented device was vastly different than defendants' device.

Therefore, out of these twenty-seven claims, plaintiff could only **stretch** four claims to even arguably allege infringement thereof by defendants' device. However, in attempting to broaden these four claims to cover defendants' device, plaintiff has clearly emphasized the invalidity of such claims which read **directly** on the prior art as indicated by pages 1 and 2 of Appendix C and Exhibits I to T.

Plaintiff is in the same untenable position of any patentee who is required to broaden the patent claims to find infringement but in doing so the broadened claims read on the prior art.

This Court should either find the four claims in issue invalid or not infringed.

"[T]he defendant has not adopted Mathe's system, but has gone to the prior art. . . . These differentiations make it clear that by no liberality of interpretation can we stretch claim 25 to read upon the defendant's device, if, indeed, it is not anticipated by the patent to Colpitts, and Arnold above referred to."

Western Electric Co. v. Sol Wallenstein, 60 F. 2d 723, 732 (C.A. 2, 1932).

TRIAL COURT ERRED IN FINDING INFRINGEMENT.

If this Court believes that the four claims of the patent in suit are valid, then a detailed review of the trial record should compel a reversal of the Judgment on the grounds of infringement. The Trial Court ignored the well-established rule that infringement can only be found where defendants' device includes each of the elements contained in each of the four claims in issue. The omission of a single element (the inertia member) avoids infringement.

"In a combination patent, such as infringed in this case, every element of the particular claim is presumably an essential and, therefore, every element of the claim, or its functional equivalent, must ordinarily be found in the accused article."

Lockwood v. Langendorf United Bakeries, Inc., 324 F. 2d 82, 88 (C.A. 9, 1963).

"In a suit for infringement of a combination claim, an accused device must embody all of the elements of the claim and an omission of a single element avoids infringement."

Stewart-Warner v. Lone Star Gas Co., 195 F. 2d 645, 649 (C.A. 5, 1952).

Your Honors should review Exhibits U, V, W and X which are defendants' claim charts illustrating that each of the four claims in issue are not infringed by defendants' device as defendants' device does **not** utilize an inertia member separate from the reel and the locking means or locking pawl. Each of the four claims as exemplified in Exhibits U to X require a safety device having three distinct elements:

- (1) a rotatably mounted reel;
- (2) locking means, *i.e.*, a locking pawl; and
- (3) an inertia member turnably movable or rotatably mounted with respect to the reel.

Defendants' patent expert found no infringement because there was **no** separate "inertia member" in defendants' device as illustrated on Exhibits U to X (R. Vol. III, p. 1518). There was no cross-examination of defendants' expert on Exhibits U, V, W and X nor any attempt to refute or overcome such Exhibits by evidence or testimony on the part of plaintiff.

Plaintiff purposely did not and could not prepare and introduce into evidence a claim chart comparing the elements of each of the claims in issue with the elements of defendants' device because it would have been obvious that the separate "**inertia member**" in each of the claims was **missing** from defendants' device. Referring to Exhibits U to X, Your Honors will note that the patented device requires a separate inertia member (colored blue) and there is no corresponding inertia member in defendants' device.

Plaintiff's *prima facie* case of infringement was introduced into evidence through its Director of Engineering, Mr. Glauser, who was never considered to be a patent expert by the Trial Court (R. Vol. III, p. 676).

On direct examination, Mr. Glauser was forced to resort to reversing parts on defendants' device in order to find even a *prima facie* case on infringement (R. Vol. III, p. 723). However, on cross-examination, Mr. Glauser could not tell the Court how the elements in defendants' device could be reversed in order to support his direct examination and testified:

"You are asking me to design another harness reel." (R. Vol. III, pp. 881-82).

Plaintiff has no evidence or testimony to support the Trial Court's finding of infringement. Plaintiff's own Director of Engineering admitted he would have to design a new reel which of necessity would require substantial change of parts. The Trial Court erred in finding infringement based upon Mr. Glauser's testimony.

See:

Kenyon v. Automatic Instrument Co., 89 Fed. Supp. 602 affirmed by C.A. 6 at 186 F. 2d 752; and

American Seating Co. v. Ideal Seating Co., 124 F. 2d 70 (C.A. 6).

PLAINTIFF IS ESTOPPED TO CLAIM INFRINGEMENT WHERE DEFENDANTS' DEVICE OMITTS SEPARATE INERTIA ELEMENT.

The history of the development of the safety devices in the patents in suit estop plaintiff from claiming infringement.

The history of the patented device initiated with a disclosure by the inventor, Pfankuch, of a safety device (Ex. 63) on November 27, 1950, which was later reduced to a model. Pfankuch's early model (1950) did **not** have an inertia member **separate** from the reel or drum and from the locking means or pawl (R. Vol. III, p. 274). Both alleged inventors, Pfankuch and Wrighton, testified that Pfankuch's early model (Ex. 63) was unsatisfactory, inconsistent and did not meet military specifications (R. Vol. III, pp. 275, 303 and 357).

Subsequently, Messrs. Pfankuch and Wrighton designed the safety device as shown in patent '233 having an inertia element which was separate from the reel or drum and from the locking means or pawl and this overcame the problems of Pfankuch's earlier model (Ex. 63) that did **not** have a **separate** inertia element (R. Vol. III, pp. 303, 357, 359 and 375).

It was uniformly agreed by the alleged inventors and other witnesses that the patented safety device required **three** separate elements:

- (1) the cable reel;
- (2) a separate inertia element; and
- (3) a separate locking pawl or means. (R. Vol. III, pp. 315, 455-58, 768, 824, 963, 1137, 1140, 1154-56, 1185, 1195, 1202-03).

Both alleged inventors, Pfankuch and Wrighton, admitted that the **separate inertia element** in the patents in suit was an **essential** element (R. Vol. III, pp. 315-17, 358-59), which was confirmed by defendants' witnesses (R. Vol. III, pp. 1137-40, 1161-62, 1311-12 and 2195).

The history and development of the safety devices of the patents in suit definitely establish through the alleged co-inventors and all of the other witnesses that there are **three separate elements required**, namely, a **reel**, an **inertia element** and a locking means or **pawl**. It was also established during the trial that the separate inertia element was **essential** and the early safety device as designed by plaintiff (Ex. 63) did **not** operate satisfactorily **without a separate inertia element** which was separate from the reel and the locking pawl.

Your Honors should also be aware that plaintiff has never sold a device similar to plaintiff's early model (Ex. 63) which did not have a separate inertia element and has never sold any commercial device which did not have a separate inertia element separate from the reel and locking pawl (R. Vol. III, pp. 276, 826, 457 and 236).

There is uncontradicted testimony that plaintiff's patented device requires an inertia member separate from the reel and the locking pawl, which is not found in defendants' device (See Exs. U, V, W and X). This Court is compelled to find no infringement because an **essential element** of the claims in issue (*i.e.*, separate inertia element) is **missing** from defendants' device. See *Stewart-Warner v. Lone Star Gas Co.*, 195 F. 2d 645 (C.A. 5, 1952).

NO INFRINGEMENT BECAUSE OF FILE WRAPPER ESTOPPEL.

The doctrine of file wrapper estoppel prevents plaintiff from now attempting to broaden its claims and claim defendants' device is an infringement.

As established hereinabove, defendants' device does **not** include a **separate inertia element** which is separate from the reel and locking means, *i.e.*, locking pawl, as required in the claims in issue of the patents in suit. During prosecution of the applications which issued as the patents in suit, plaintiff was required to add to the claims language to define an inertia member to overcome the prior art patent to Sharpe (Ex. D).

It is well settled that if the device which is accused to be an infringement falls within that area which was excluded from the claims in order to meet objections of the Patent Office, then file wrapper estoppel will prevent the party suing on the patent from claiming infringement by equivalents.

See:

Van Brode Milling Co., Inc. v. Cox Airguage System, Inc., 279 F. 2d 313 (C.A. 9, 1960);

D & H Electric Co. v. M. Stephens Mfg. Co., Inc., 233 F. 2d 879 (C.A. 9, 1956);

Exhibit Supply Co. v. Ace Corp., 315 U.S. 126.

In the present case, such a file wrapper estoppel was established in the first patent '233 and carried over into the second patent '234.

In the file wrapper (Ex. 131) of the first patent in suit (Ex. 1), the Patent Office finally rejected (Ex. 131, pp. 40-41) most of the claims present in the application at that time and primarily relied upon a prior

art patent to Sharpe (Ex. D). The Sharpe patent disclosed a safety device substantially identical in function and operation to Pfankuch's early model (Ex. 63; R. Vol. III, p. 1322) which included a reel and locking means but did **not** include a separate inertia element separate from the reel and separate from the locking means (R. Vol. III, pp. 1320-22).

In an attempt to overcome the Sharpe patent used to finally reject the claims, plaintiff filed an amendment (Ex. 131, pp. 54-61) in the Patent Office on March 1, 1956, and added new claims 23 and 25 which subsequently issued as claims 7 and 9, respectively, of the patent in suit '233 (Ex. 1).

Claim 25 did **not** require a separate inertia member and was **still fully anticipated by the Sharpe patent**. Claim 23 did not specifically require the inertia member to be turnably movable with respect to the reel nor was the inertia member definitely related to the other elements of the claim, and **therefore the Sharpe patent still anticipated claim 23**.

In this amendment of March 1, 1956, plaintiff interpreted claim 23, which issued as claim 7 of patent '233, as follows:

"This claim includes in addition the .inertia member 46, means namely gearing 41, 42, connecting the inertia member to the reel, locking means, namely, pawl 58, within the device for engaging the reel, . . ." (Emphasis added.) (Ex. 131, p. 58).

Therefore, plaintiff has interpreted its own claims and is now estopped to change or broaden this interpretation. Plaintiff's interpretation to overcome the

Sharpe patent required three distinct and separate elements;

- (1) a reel;
- (2) an inertia member 46; and
- (3) locking pawl 58.

The Patent Examiner then rejected the new claims (Ex. 131, p. 62) and held:

“Claims 23-25, as amended, are still held to be unpatentable over Sharpe, Scheuer, Caouette or Trouin. The recitation of a particular use for the inertia reel does not render these claims patentable . . .”

“Claims 26-28 are still held to be unpatentable over Sharpe. The inertia member and its relationship to the floating reel is too broadly recited in these claims to be considered inventive over the inertia responsive radially movable reel of Sharpe.”

Plaintiff then filed a Notice of Appeal (Ex. 131, p. 63) and an Appeal Brief (Ex. 131, pp. 64-72) wherein plaintiff again interpreted claims 23 and 25 (claims 7 and 9 of '233 patent) as requiring three separate elements:

“Referring now to claim 23, it will be noted that this claim calls for an inertia lock device . . . having a rotatably mounted reel 44 therewithin, . . . an inertia member, i.e., fly wheel member 46, and . . . locking means, i.e., **pawl 58**, within the device for engaging the reel . . .” (Ex. 131, p. 70).

“Claim 25 includes supporting housing 21-22 which is not disclosed in Sharpe, . . . This claim also includes locking means, i.e., *pawl 58* . . .” (Ex. 131, p. 71).

At the same time, May 10, 1956, as the Appeal Brief was filed, plaintiff filed an amendment (Ex. 131, pp. 73-76) which clearly and irrefutably **added the separate inertia member** to claims 23 and 25 to make these claims conform to plaintiff's interpretation as pointed out above (R. Vol. III, p. 1167).

Claim 25 which did **not** have an inertia element was amended to include:

“... an inertia member within said housing turnably mounted with respect to said reel means, means for coupling said inertia member to said reel means, . . .” (Ex. 131, p. 73).

Claim 23 was also amended and now required the inertia member to be “turnably movable with respect to said reel, means for ” connecting said inertia member to the reel (Ex. 131, p. 73).

In this same amendment, plaintiff admitted (Ex. 131, p. 75) that **“the claims are now narrower”** if the amendment was entered.

The Patent Examiner filed his “Examiner's Answer” (Ex. 131, p. 77) to this appeal by plaintiff and **in view of the amendments to claims 23 and 25 withdrew the Sharpe patent.**

“However, due to limitations added by the amendment filed May 10, 1956, the Sharpe reference is no longer pertinent.” (Ex. 131, p. 79).

It is therefore clear and plaintiff is **estopped** to deny that the Sharpe patent was withdrawn as a reference because of the amendments to these claims and the supporting admissions as contained in the amendment of May 10, 1956, which irrefutably established that these claims required three separate members, (1) the

reel, (2) the inertia element 46, and (3) the locking pawl 58.

The Sharpe patent only had two of these elements, a reel and locking means and did not have an inertia member separate from the reel and locking pawl.

Therefore, if there was an advance by plaintiff, then it would have to be the addition of a separate inertia element or flywheel over the Sharpe patent and also over the early Pfankuch disclosure and model (Ex. 63) as testified to by Gabriel, defendants' patent expert (R. Vol. III, p. 1164).

On page 67 of Exhibit 131, plaintiff admits what the invention was:

"Applicants, by incorporating a geared-up fly-wheel within their reel, have been able to produce a reel of small size and over-all weight which will serve the purpose, and this is invention of high order."

Plaintiff is now **estopped**, by its own admissions, before the Patent Office, from attempting to combine the separate **inertia element 46** with the **locking pawl 58** in order to have claims 7 and 9 (claims 23 and 25) of patent '233 read on the **single locking element 38 in defendants' device**. Mr. Gabriel, defendants' patent expert, testified:

"A. Yes, this is a clear case of file wrapper estoppel in that regard." (R. Vol. III, p. 1167).

Plaintiff is estopped to now claim a broader scope of its claims in view of the file history and what this Court has held in *Moon v. Cabot Shops, Inc.*, 270 F. 2d 539 (1959):

". . . Claims of a patent must be construed not only in the light of the specification and drawings.

bur also with reference to the file wrapper history. *Whiteman v. Matthews*, 9 Cir., 216 F.2d 712, 715, 104 USPQ 83, 85. That is, the claims of the patent must always be explained by and read in connection with the specifications and in the light of definitions and admissions made by applicant in the proceedings in the Patent Office."

Mr. Gabriel's testimony of file wrapper estoppel is unrefuted by plaintiff whose counsel **refused to cross-examine** Mr. Gabriel on such testimony.

The only witness for plaintiff who discussed the claims and file histories of the patents in suit was Mr. Glauser, who admitted on *voir dire* examination that he **was not** a patent expert (R. Vol. III, p. 526); **did not know** if the specification of a patent limits the scope of the interpretation of claims (R. Vol. III, p. 982); and **did not know** there can be no infringement by a device if there is a different mode of operation involved than that used by patented device (R. Vol. III, p. 990).

Plaintiff has offered no testimony to rebut Gabriel's testimony which definitely established that claim 9 of the '223 patent (Ex. X; R. Vol. III, p. 1516), claim 7 of the '233 patent (Ex. V; R. Vol. III, p. 1520), claim 1 of the '234 patent (Ex. W; R. Vol. III, p. 1524), and claim 5 of the '234 patent (Ex. X; R. Vol. III, p. 1530) were not infringed by defendants' device.

In the event claims 7 and 9 of patent '233 are valid, then Your Honors should be compelled to find defendants' device **is not an infringement** because of file wrapper estoppel.

FILE WRAPPER ESTOPPEL OF '233 PATENT CARRIES OVER TO '234 PATENT.

Plaintiff admits the '234 patent is allegedly an improvement over the '233 patent (R. 603) and it is so stated in the specification of the '234 patent (Col. 1).

The primary improvement of the '234 patent was eliminating translational movement of the entire drum or reel assembly as required in the operation of the safety device of the '233 patent (R. Vol. III, pp. 378-79 and 1188).

This improvement of the '234 patent did not involve eliminating the separate inertia element as this was an **essential element** (R. Vol. III, p. 1189). The same three separate essential elements, (1) a reel, (2) an inertia member, and (3) a locking pawl, were still required in the alleged improvement of the '234 patent as were required in the '233 patent and its file history.

Defendants' expert, Mr. Gabriel, testified that the **essential elements** and the **estoppels** that were created in the '233 patent **were carried over into the alleged improvement, '234 patent** (R. Vol. III, p. 1189).

Therefore, patents '233 and '234 can not be infringed by defendants' device because of the file wrapper estoppel on the separate inertia element.

NO INFRINGEMENT BECAUSE DEFENDANTS' DEVICE HAS A DIFFERENT MODE OF OPERATION THAN PATENTED DEVICE.

In addition to the reasons stated heretofore why defendants' device is not an infringement of the patents in suit, a further reason is that defendants' device has a **different mode of operation** than the patented device.

This Court has uniformly held that a plaintiff must establish infringement by showing the accused device not only meets the terms of the patent claims but also has the same mode of operation as the patented device.

Your Honors in *Grant v. Coppell et al.*, 99 F. 2d 106, 110, in finding non-infringement, held:

"We note that appellant contends that the claims of the patent in suit read upon appellee's device. We may assume that this is true especially as to claim 9. But infringement is not a mere matter of words. Here, we hold that the mode of operation is different and there is no equivalency of means."

Again in 1963, Your Honors in *Lockwood v. Langendorf United Bakeries, Inc.*, 324 F. 2d 82, 88, also held:

"The mere fact that the accused article performs the same function and achieves the same result as the patented article does not necessarily establish infringement unless it can be found that this is accomplished substantially the same way and where, as in this case, the art is fairly crowded and main elements of the patent are found or indicated in prior art, this issue should be determined narrowly rather than liberally."

Plaintiff's own witness on cross-examination compared defendants' device with the patented device and correctly, stated that "these are two entirely different units" (R. Vol. III, p. 468).

Defendants' device is entirely different than the patented device as admitted by plaintiff's primary witness and Director of Engineering, Mr. Glauser, who testified there were at least **three** different modes of operation in the patented device not found in defendants' device.

On cross-examination, Mr. Glauser admitted that the **first** difference in mode of operation of defendants' device was in not requiring **any translation** of the reel or drum assembly (R. Vol. III, pp. 89-90). Defendants' experts agreed with plaintiff's expert (R. Vol. III, pp. 1120 and 1313).

Mr. Glauser then admitted that the **second** difference in the mode of operation of defendants' device was in the *unbalancing* of defendants' device by having the locking pawl mounted eccentrically on the reel (see Chart 3), whereas, the patented device had the elements arranged to provide a *balanced* device. (R. Vol. III, pp. 985-86). Again, this second difference in the mode of operation of defendants' device was confirmed by defendants' witness (R. Vol. III, p. 1205).

Mr. Glauser also admitted that there was a **third** difference in the mode of operation between defendants' device and the patented device in that the patented device required a **manual unlocking** feature and defendants' device did not (R. Vol. III, pp. 986-87). This third difference was also confirmed by defendants in R. Vol. III, pp. 1205 and 1328-29.

The three differences in the mode of operation between defendants' device and the patented device as established by plaintiff's own chief witness, Mr. Glauser, and confirmed by defendants' witnesses, has **not** been refuted or controverted in any way by plaintiff.

Therefore, in view of the unrefuted testimony and law, as set forth above, Your Honors should be compelled to find the patents in suit are not infringed because defendants' device utilizes a different mode of operation than that required by the device covered by the patents in suit.

CONCLUSION.

In this brief, defendants have earnestly attempted to concisely present the facts (with supporting record references) directed to the determinative issues, in order to facilitate the work of this Court. Only controlling precedents have been cited.

Your Honors are respectfully requested to consider the "Question Presented" on pages 22-25 of this brief. It is submitted that the record evidence compels affirmative answers to questions 1 and 2. Legal precedents require that the answer to question 3 be "no invention".

It is submitted that the public interest, the facts and the right of men to utilize what is in the public domain will cause this Court to hold that the public (and defendants) cannot be restrained from adapting and freely using the teachings and devices in the public domain (question 4).

The subject matter relates to an old art which has expanded because the use of the airplane has grown.

In answering question 5, it is believed that the Court will conclude that the patents in suit involved only the obvious substitution of mechanical equivalents available in the prior art, without the production of a new or unobvious result. This Court will not be misled by the “man-sensitive” straw man concocted by plaintiff.

Compliance with statutory requirements and the standards of patentability, which this Court has consistently endorsed, necessitates answers to questions 6, 7 and 8 which support defendants’ position.

Questions 9 and 10 must be answered in defendants’ favor in view of the exhibits, facts and law concerning noninfringement of this case.

Defendants advocate with sincerity and conviction that the Judgment of the Trial Court be reversed, with costs.

C. A. MIKETTA,
WILLIAM POMS,
GUY PORTER SMITH,

of

MIKETTA, GLENNY, POMS &
SMITH,

Attorneys for Appellants.

Of Counsel:

E. SEWARD STEVENS,

of

GUION and STEVENS.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM POMS

APPENDIX A.

Pertinent Sections of Title 35, U.S.C.

§101 “Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. * * *

§102 “Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

* * *

(c) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or

(f) he did not himself invent the subject matter sought to be patented, or * * *

§103 “Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in sec-

tion 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.”

§115 Oath of applicant

The applicant shall make oath that he believes himself to be the original and first inventor of the process, machine, manufacture, or composition of matter, or improvement thereof, for which he solicits a patent; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any officer having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose authority shall be proved by certificate of a diplomatic or consular officer of the United States, and such oath shall be valid if it complies with the laws of the state or country where made. When the application is made as provided in this title by a person other than the inventor, the oath may be so varied in form that it can be made by him. * * *

APPENDIX B.

DEFENDANTS' EXHIBITS.

<u>Description</u>	(Pages in Record Vol. III)	
	<u>For Ident.</u>	<u>In Evid.</u>
Prior art book of patents	119	119
Enlargement of Ham patent No. 700,763	1210	1229
Enlargement of Ricketts patent No. 1,393,570	1215	1229
Enlargement of Burdon patent No. 888,418	1219	1229
Enlargement of defendants' device	374	376
Claim chart—claim 9 of patent '233 and Ham 700,763	1223	1229
Claim chart—claim 9 of patent '233 and Ricketts 1,393,570	1230	1233
Claim chart—claim 9 of patent '233 and Burdon 888,418	1233	1237
Claim chart—claim 7 of patent '233 and Ham 700,763	1237	1241
Claim chart—claim 7 of patent '233 and Ricketts 1,393,570	1241	1244
Claim chart—claim 7 of patent '233 and Burdon 88,418	1244	1247
Claim chart—claim 1 of patent '234 and Ham 700,763	1247	1250
Claim chart—claim 1 of patent '234 and Ricketts 1,393,570	1250	1254
Claim chart—claim 1 of patent '234 and Burdon 888,418	1254	1256
Claim chart—claim 5 of patent '234 and Ham 700,763	1257	1260
Claim chart—claim 5 of patent '234 and Ricketts 1,393,570	1260	1263
Claim chart—claim 5 of patent '234 and Burdon 888,418	1263	1267
Claim chart—claim 9 of patent '233 and defendants' device	1512	1516
Claim chart—claim 7 of patent '233 and defendants' device	1516	1520
Claim chart—claim 1 of patent '234 and defendants' device	1520	1524

DEFENDANTS' EXHIBITS (Continued)

Ex.	Description	(Pages in Record Vol. III)	
		<u>For Ident.</u>	<u>In Evi</u>
X	Claim chart—claim 5 of patent '234 and defendants' device	1525	153
Z	Letter of June 22, 1962	168	17
AA	Letter of Nov. 3, 1958	174	17
AB	Plaintiff's report no. 509	758	77
AC	Spool of plaintiff's model 0108	853	86
AD	Ring of plaintiff's model 0108	853	86
AE	Ring of plaintiff's model 0108	853	86
AF	Casing for plaintiff's model 0108	853	86
AG	Rewind spring for plaintiff's model 0108	853	86
AH	Tension spring for plaintiff's model 0108	854	86
AI	Claim chart—claim 1 of patent '234 and Cushman's early device	1273	127
AJ	Claim chart—claim 5 of patent '234 and Cushman's early device	1279	128
AK	Plaintiff's answers to defendants' interrogatory no. 10	—	127
AL	Swedlow sketch	—	129
AM	Swedlow sketch (case one)	1299	130
AN	Swedlow sketch (case two)	1301	130
AO	Swedlow sketch (case three)	1303	130
AP	Swedlow sketch (case four)	1304	130
AQ	Swedlow sketch	1342	135
AR	Swedlow report	1352	136

PLAINTIFF'S EXHIBITS.

<u>Description</u>	(Pages in Record Vol. III)	
	<u>For Ident.</u>	<u>In Evid.</u>
Patent in suit No. 2,845,233	20	24
Patent in suit No. 2,845,234	20	24
Assignment of patent '233	22	24
Assignment of patent '234	22	24
Merger agreement between plaintiff, Pacific Scientific Co. and Pacific Scientific Aeroproducts	23	24
Plaintiff's model 0106	24	718
Plaintiff's model HR 30	26	718
Plaintiff's model 0108	26	718
Plaintiff's model 0103114	26	718
Plaintiff's model 0103144	26	718
American Seating Co.'s model 0-4600	26	205
Hardman Co. model	35	720
Defendants' model 65-A	35	580
Teleflex Products Ltd.'s model D73766	35	85
Teleflex Products Ltd.'s model	35	85
Aircraft Mechanics Inc.'s model 758	35	718
License agreement—American Seating	35	38
License Agreement—Hardman	35	40
License Agreement—Teleflex	41	47
Extension of License Agreement—Teleflex	41	47
Foreign license agreement—Shimadzu	41	47
Foreign License Agreement—Sarma	41	47
Foreign License Agreement—Sarma	41	47
Plaintiff's U.S. sales graph	47	52
Plaintiff's foreign sales graph	48	57
Plaintiff's U.S. and foreign sales graph	48	57
Plaintiff's sales books	48	—
Plaintiff's foreign sales books	53	57
Foreign (Teleflex) royalty reports	53	57
Foreign (Shimadzu) royalty reports	53	57

PLAINTIFF'S EXHIBITS (Continued)

<u>Ex.</u>	<u>Description</u>	(Pages in Record Vol. III)	
		<u>For Ident.</u>	<u>In Ev.</u>
31	Foreign (Sarma) royalty reports	53	57
33	British patent no. 746,540	73	97
34	French patent no. 1,096,312	73	97
35	Japanese patent no. 279,878	73	97
36	Canadian patent no. 581,902	73	97
37	British patent no. 761,518	73	97
38	French patent no. 1,116,502	73	97
39	W. German patent no. 1,013,176	73	97
40	Japanese patent no. 237,977	73	97
41	Canadian patent no. 569,635	73	97
42	May 14, 1958 letter	86	90
43	May 19, 1958 letter	86	90
44	July 15, 1958 letter	86	90
45	October 7, 1958 letter	86	90
46	Invoice No. LAA 14128	86	94
48	Defendants' specification-single AOT MOD 94	510	51
49	Defendants' specification-double AOT MOD 95	510	51
50	Defendants' brochure—Model 95 E	510	51
51	Defendants' magazine (March, 1959)	510	51
52	Defendants' Magazine (Summer, 1960)	510	51
53	Defendants' brochure—Model 95	510	51
54	Defendants' drawing 48123	410	42
55	Defendants' drawing 49099	410	42
56	Defendants' drawing 49354	410	42
57	Defendants' drawing 49510	410	42
62	American Seating's sales chart	213	22
63	Pfankuch's early disclosure of a safety device	273	29
64	Cushman model—Nov. 20, 1952	337	34
65	Cushman disclosure	400	40
66	Spielman patent no. 2,982,492	423	43
67	National Advisory Committee for Aeronautics' Technical Note	630	63

PLAINTIFF'S EXHIBITS (Continued)

<u>Description</u>	(Pages in Record Vol. III)	
	<u>For Ident.</u>	<u>In Evid.</u>
Plaintiff's data report 557	439	449
Enlarged Fig. 1 of patent '233	527	551
Enlarged Fig. 1A of patent '233	531	551
Enlarged Fig. 2 of patent '233	533	551
Enlarged Fig. 3 of patent '233	533	551
Enlarged Fig. 5 of patent '233	533	551
Enlarged Fig. 1 of patent '234	552	574
Enlarged Fig. 2 of patent '234	552	574
Enlarged Fig. 3 of patent '234	552	574
Enlarged Fig. 4 of patent '234	552	574
Enlarged Fig. 6 of patent '234	552	574
Enlarged Fig. 7 of patent '234	552	574
Pictorial view of defendants' models 95 & 65	581	600
Pictorial view of defendants' models 94 and 102	581	600
Pictorial view of defendants' models 94 and 102	581	600
Section view of defendants' models 94 and 102	581	600
Section view of defendants' models 94, 102, 95 and 65 (unlocked)	581	600
Section view of defendants' models 94, 102, 95 and 65 (locked)	581	600
Plaintiff's graph-locking curve for model 95		639
Plaintiff's purchase order, Jan. 31, 1964	577	580
Part of defendants' device	433	450
Plaintiff's computations	614	640
Plaintiff's computations		906
Photograph	498	505
Photograph	498	505
Photograph	498	505
Excerpt from "Analytical Mechanics for Engineers"	614	640
Defendants' model 94 and model 95 casing	575	580
Defendants' model 94 case for spool and locking mechanism of Exh. 95	575	580

PLAINTIFF'S EXHIBITS (Continued)

(Pages in Reco
Vol. III)

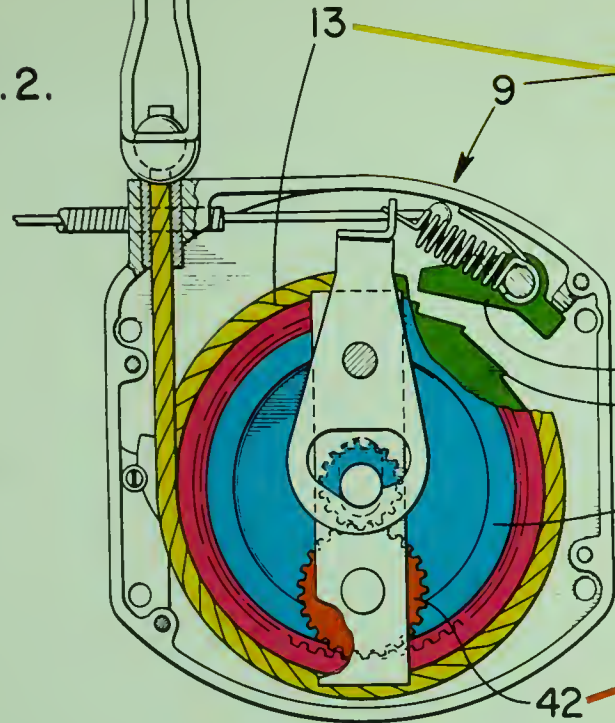
<u>Ex.</u>	<u>Description</u>	<u>For Ident.</u>	<u>In Evi</u>
97	Locking mechanism of model 95 used for analysis of Exhs. 87 and 90	575	640
98	View of Fig. 7 of patent '233	544	55
100	File history of Spielman Patent no. 2,982,492	652	66
101	Drawing (sled)		67
102	Claim 7 of patent '233	674	69
103	Bosch patent No. 2,105,469	678	68
109	Claim 9 of patent '233	697	70
110	Claim 1 of patent '234	702	71
111	Claim 5 of patent '234	713	71
113	Prior art patents	746	93
114	Prior art patents	746	93
116	Movie film	1015	—
117	Tube	1008	—
118	Plaintiff's interrogatories 1-21	—	108
119	Defendants' answers to interr. 1-21	—	108
120	Defendants' answers to interr. 9, 10, 11, 16 and 17	—	109
121	Plaintiff's interrogatories 22-28	—	109
122	Defendants' answers to interr. 22-28	—	109
123	Plaintiff's interrogatories 1-33	—	109
124	Defendants' answers to interr. 1-33	—	109
125	Defendants' answers to interr. 13 and 14	—	109
126	Plaintiff's interrogatories 34-49	—	110
127	Defendants' answers to interr. 34-49	—	110
128	Plaintiff's interrogatories 50-57	1105	110
129	Defendants' answers to interr. 50-57	—	110
130	Stipulation	—	110
131	File history of patent '233	—	108
132	File history of patent '234	—	108
133	Deposition of Lautier	—	110
134	Deposition of Spielman	—	110

PLAINTIFF'S EXHIBITS (Continued)

<u>Description</u>	(Pages in Record Vol. III)	
	<u>For Ident.</u>	<u>In Evid.</u>
Drawing by Glauser	1435	1437
Defendants' drawing no. 44660	1455	1498
Defendants' drawing no. 44658	1456	1498
Plaintiff's (AY) sketch	1566	1648
Plaintiff's (AY) sketch	1566	1648
Defendants' drawing 65-A	1579	1648
Defendants' drawing 94	1579	1648
Plaintiff's photographs	1592	1647
Plaintiff's photographs	1592	1647
Plaintiff's (AY) sketch	1619	1647
Plaintiff's photographs	1635	1647
Film viewer	1646	1647

9. Safety apparatus adapted to be used on
a moving vehicle, comprising, in
combination,

FIG. 2.



a supporting housing on said
vehicle,
a flexible connector extending from
said supporting housing and adapted
to engage an occupant in the vehicle,

resilient reel means connected
to said flexible member and
carried within said housing for
normally maintaining a light
tension on said flexible connector
while permitting the same to yield,
whereby the occupant is allowed
freedom of motion,

an inertia member within said housing
turnably mounted with respect to said
reel means,

means for coupling said inertia
member to said reel means,

locking means in said housing

said inertia member being operable
by inertia to cause said locking
means to lock said flexible
connector positively against
further movement outwardly with
respect to said housing when said
flexible connector is pulled
outwardly of said housing at a rate
exceeding a predetermined
acceleration, due to forces
tending to dislodge the occupant
from his seat, whereby the
occupant is prevented from being
dislodged.

YES

YES

FIG. 3.

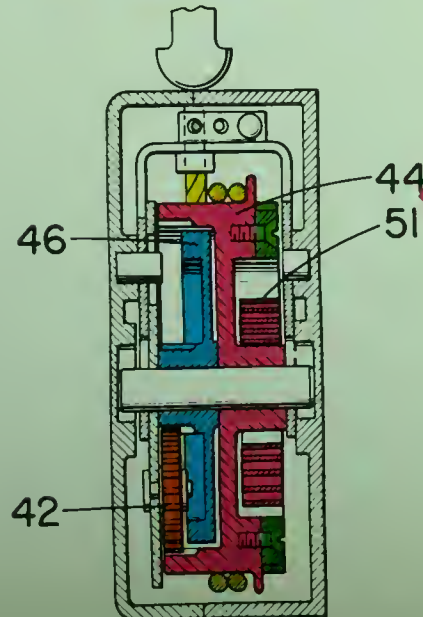


FIG. 2.

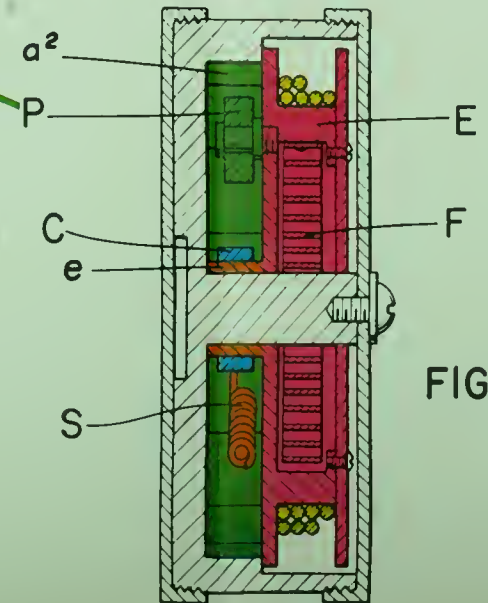
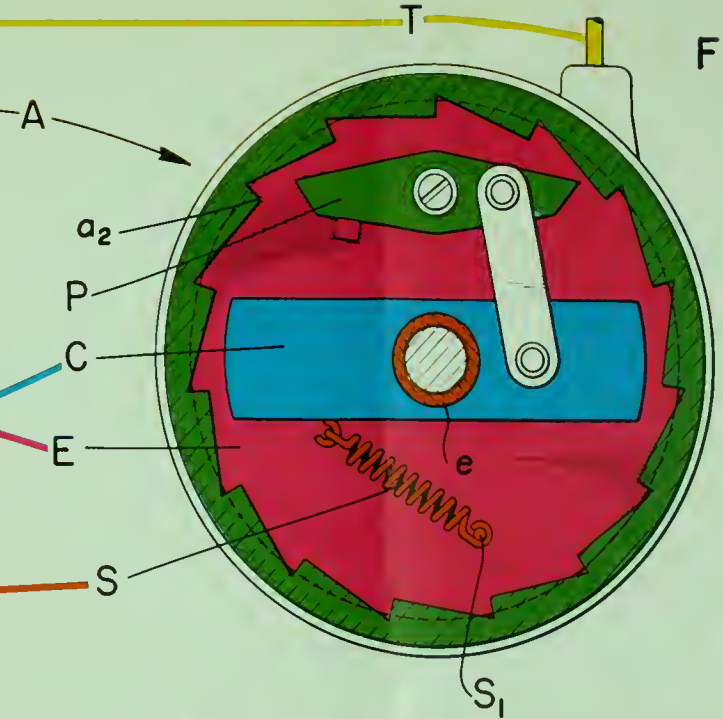
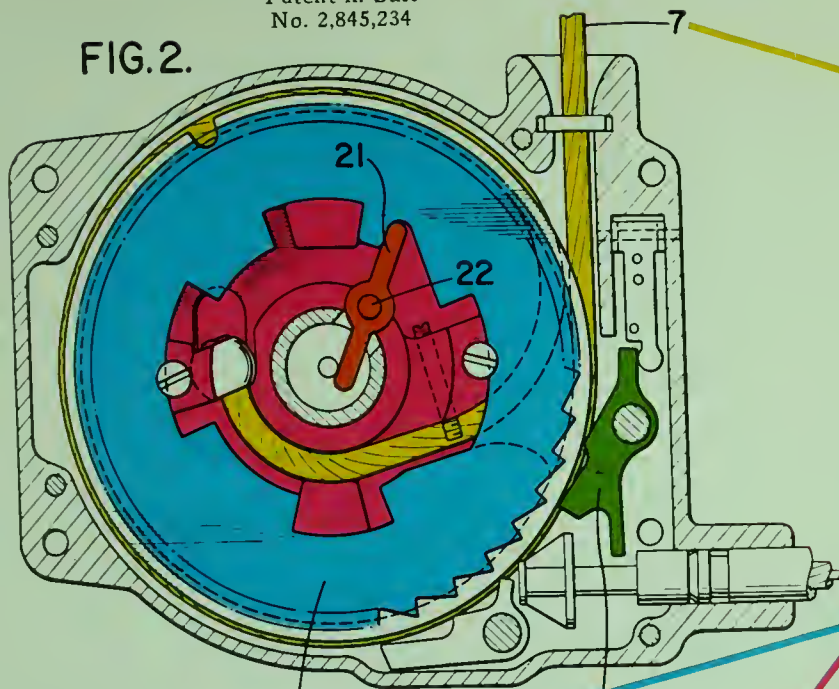


FIG. 1.

FIG. 2.



5. A safety device for mounting in a vehicle to restrain the movement of a body within the vehicle when the body is subjected to relatively high acceleration movement relative to the vehicle comprising

a cable adapted to be coupled to the body,

a rotatably mounted cable reel having said cable secured thereon,

resilient means coupled to said reel for rotating said cable reel in a direction to wind said cable on said reel, said reel rotating in the opposite direction to unwind said cable therefrom due to forces exerted by a pull on the cable,

a rotatably mounted inertia member,

means for yieldably coupling said inertia member to said reel to thereby cause said member to rotate with said reel during rotation in said unwind direction below a certain acceleration,

YES said means yielding during rotation relative to said inertia member,

and means associated with said coupling means operated when said reel rotates relative to said inertia member for stopping rotation of the reel in said unwind direction.

FIG. 2.

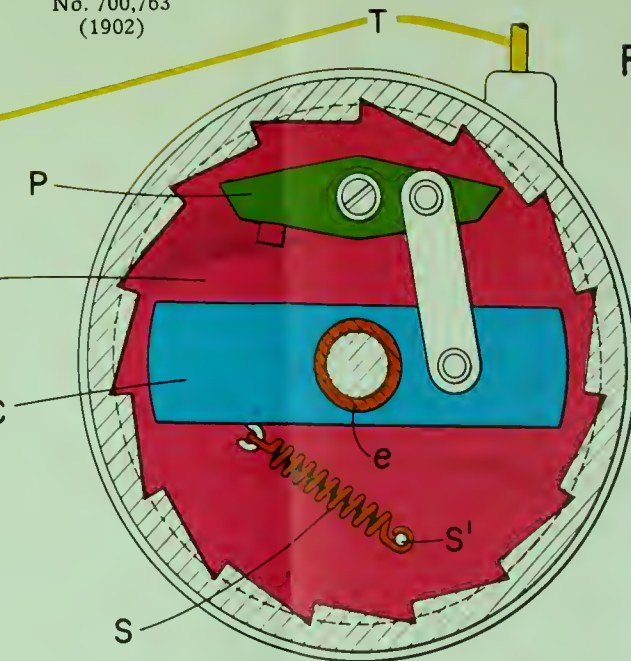


FIG. 3.

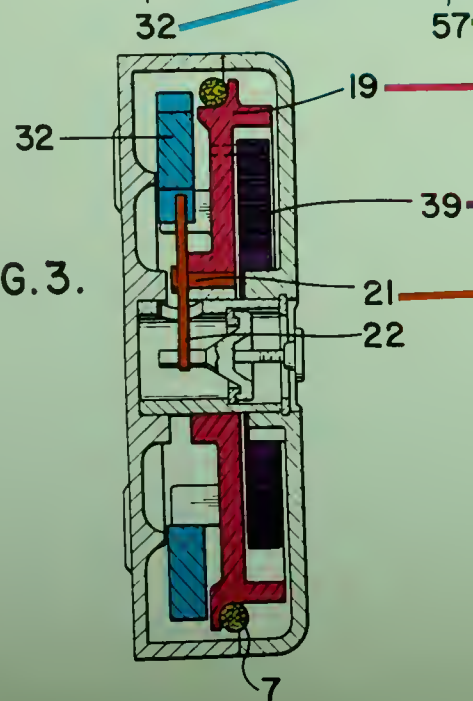
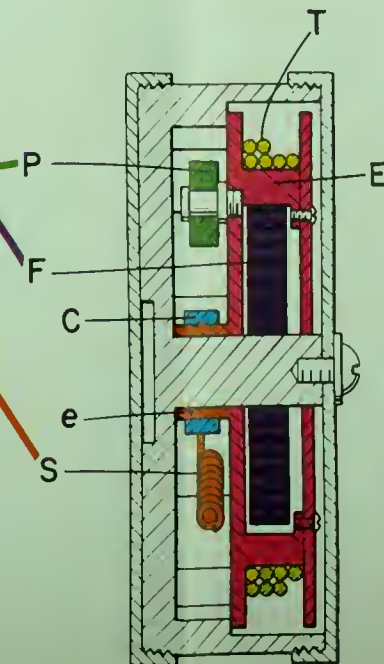


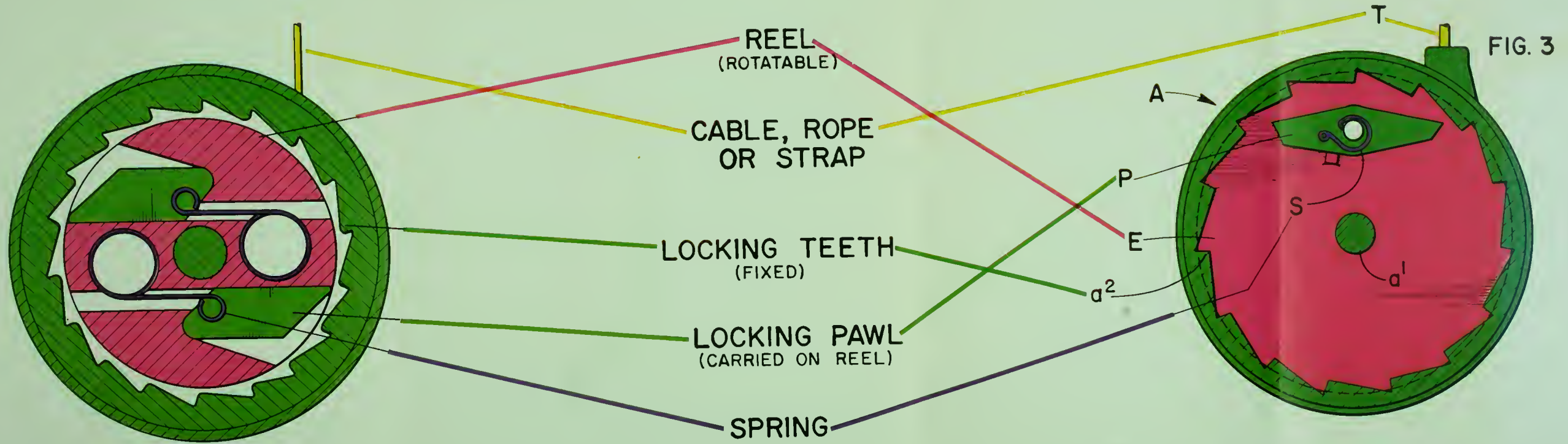
FIG. 1.



DEFENDANTS' DEVICE
EMPLOYS ELEMENTS OF PRIOR ART

HAM
No. 700,763
(1902)

DEFENDANTS' DEVICE



IN BOTH DEVICES, LOCKING PAWL MOVES OUTWARDLY
AGAINST BIAS OF SPRING TO ENGAGE FIXED LOCKING
TEETH AND PREVENT FURTHER UNWINDING OF CABLE
OR ROPE FROM REEL

